IN THE

Supreme Court of the United States

October Term, 1942.

No.....

WILL H. PERRY, also known as WILLIAM H. PERRY,

Petitioner,

vs.

ANNA BAUMANN, MAUD E. LANE, and LANE MORTGAGE COMPANY, a corporation, as Trustee, etc.,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions of the Courts Below.

The District Court did not render an opinion.

The opinion of the Ninth Circuit Court of Appeals appears at page 164 of the record.

II.

Statement of the Case and the Facts.

This has been covered under headings Nos. II and III in the foregoing petition for the writ of *certiorari*. For the sake of brevity the statement is not repeated here.

III.

Specifications of Errors.

The following are assigned as errors in connection with the judgment of the Ninth Circuit Court of Appeals made on June 8, 1942:

(1) Its affirming the judgment of the lower court by holding that the findings upon which that judgment is based are amply supported by the evidence.

(2) The judgment of the lower court accepted by the appellate court without discussion was based upon findings of fact which in material matters are clearly not sustained by the evidence and were contrary to the evidence, and were predicated upon an erroneous conception of the effect to be given work done under the Agricultural Adjustment Administration of the United States Government, and as to the nature and effect of rentals received by the debtor in relation to debtor's status as a farmer.

Such material findings and the particularities wherein same are erroneous are as follows:

(A) That portion of Finding No. IV reading as follows [Tr. pp. 129-130]:

> "The Court finds that the primary and principal occupation of the debtor is that of property owner, realtor and owner and operator of a bar and cocktail lounge, and that since 1923 the debtor has been principally looking after his own properties, farms, buildings and vacant properties. . . . The court finds that more than 50% of the personal time and attention of the debtor was and is devoted to his activities in and about the Commercial Club Building in the City of Los Angeles, where he operated his bar and cocktail lounge and his real estate office, and

which building the debtor claimed to own and in which he has been adjudged in a state court action to have no interest except in trust for other persons."

Said finding is contrary to the evidence and fails to give proper effect to work done under the Agricultural Adjustment Administration of the United States Government and the effect of rentals received in relation to debtor's status as a farmer.

It is to be noted that no oral testimony was taken before the District Judge in this case. The evidence consists entirely of: (a) the record of the case itself; (b) affidavits of counsel for opposing parties; (c) resumé of facts by the Conciliation Commissioner in the case; (d) a summary of evidence submitted on behalf of the debtor.

The resumé of facts by the Conciliation Commissioner was a resumé of facts established upon a general examination of the debtor prior to the filing of the said motions to dismiss. It is definitely a part of the record of this case, even though the issues raised by the motions to dismiss were not formally before the Commissioner, for the reason that each motion to dismiss expressly recites that the motion is based, among other things, upon said resumé. The Conciliation Commissioner was the only judicial officer who heard the debtor personally testify. The summary of evidence submitted on behalf of the debtor was by reference incorporated in its entirety in the affidavits of debtor in opposition to each of the motions. These observations with respect to the record are applicable not only to the particular finding here considered, but to all the findings of the Court. In connection with the particular finding under consideration, it is

to be noted that only a small part of the content of affidavits in support of the motions to dismiss is devoted to the activities of the debtor in relation to his occupation; a somewhat larger content to the question of his income and a very great part thereof to matter relating to the possibility of rehabilitation and his purpose in filing his debtor's proceeding. Likewise in connection with this finding under consideration, the evidence does not appear to be conflicting on material facts. The nearest approach to a conflict of evidence in respect to the facts is contained in the affidavit of William J. Clark [Tr. p. 21] where the affiant after generally describing the building, states that the supervision thereof requires the major part of the time of the manager of the building, and it is not possible for a man to manage said property, and spend three-fourths of his time in another occupation unless he delegates the management to others. But such management was delegated, in that it appears from the affidavit of the debtor in opposition to that of William J. Clark [Tr. p. 71] that at all times when the building was under the control of the debtor he engaged a manager to operate and conduct the same; and there is no evidence in conflict with his statement that he spent approximately three-fourths of his time in the management and operation of the two ranch properties. The controversy therefore in respect to this particular finding arises solely from inferences and deductions to be made from material facts in respect to which there is no conflict of evidence. The Court in this finding finds that a primary and principal occupation of the debtor was that of a realtor. Yet in Finding III [Tr. pp. 128-129] in respect to the activity of the debtor as a realtor, the court finds:

> "The court finds that though debtor held a license as realtor, he did not engage in said business and

has not earned nor has he received any commissions or compensation whatever as a real estate broker."

This is supported by the evidence of the debtor to the effect that though he now holds and for many years has held a broker's license as a realtor, he has earned no commissions whatever as a real estate broker. [Tr. pp. 33-70.]

The Court finds also that a principal and primary occupation of the debtor was that of property owner, and operator of a bar and cocktail lounge.

The evidence does not justify or sustain this finding, but shows that the primary and principal occupation of the debtor was that of a farmer within the definition of Section 75r of the Bankruptcy Act. In connection with the activities of the debtor in the operation of the cocktail lounge the substance of the evidence is as follows:

The debtor did not personally operate the bar and cocktail lounge. This was done through two bartenders and a janitor. [Tr. p. 32.] He had not even ever checked the register. Mrs. Perry did the checking. [Tr. p. 33.] His reason for opening the bar was that he wanted a ground for remaining in possession after the appointment of a receiver for the building. [Tr. p. 32.]

In respect to his occupation as a property owner, the evidence is substantially as follows:

In his resumé, the Conciliation Commissioner said [Tr. pp. 88-89]:

> "The debtor spends the major portion of his time in connection with his farming operations in San Diego County and Modoc County, although he maintains an office in the office building in Los Angeles heretofore described. The major portion of his time when in Los Angeles is devoted to the farming op-

erations of the two farms in San Diego and Modoc Counties. By far the major portion of his net income is derived from the farming operations conducted by him in San Diego and Modoc Counties."

In respect to the building, his title was in dispute. The Court in Finding No. IV [Tr. p. 130] states, "The debtor claimed to own this building, but it had been adjudged in the State court that he had no interest except in trust for other persons." This is in accord with the evidence. [Tr. pp. 14-15.] He invested none of his own funds in this building. [Tr. p. 14.] A receiver has operated this property since Apr. 29, 1937. [Tr. p. 97.] The other properties owned by the debtor at the time of the filing of the petition were two farm properties, viz., the Triangle Ranch and the La Costa Ranch. Perry was born on a farm. [Tr. p. 78.] He left home when he was eighteen years old, married and went on a farm and at no time since that time has he not owned a farm. [Tr. p. 91.]

The debtor spent probably $20,000.00 on the La Costa Ranch. [Tr. p. 33.]

Perry personally farmed 243.6 acres of the La Costa Ranch. [Tr. p. 41; Finding of Court IV, Tr. p. 129.] From this he produced and sold lima beans and barley. [Tr. p. 41.] He rented out approximately 250 acres. [Tr. p. 41.] The rest of the property was worked by him in compliance with the United States Government agricultural program, for which he obtained payment from the United States Government. [Tr. p. 41.] In this connection, he subsoiled and disced in over 400 acres. [Tr. p. 41.] In connection with this work in compliance with the United States Government agricultural program, he planted hay for pasture purposes in that under the

requirements of the Government, he could not cut and sell it. [Tr. p. 41.] He was on the La Costa Ranch almost every week, and when there helped with the physical labor. [Tr. p. 40.] These were farming operations.

In connection with the Triangle Ranch, the record ownership thereof was in Co-Operative Land and Livestock Corporation from 1930 until 1938. [Tr. p. 36.] The debtor acquired all of the stock in this company in 1931 [Tr. pp. 36-37] for a consideration of $10,000.00, which consideration has been paid.

The record title was transferred to the debtor's daughter on March 16, 1938 [Tr. p. 31], and since that time debtor has operated under a lease from his daughter.

The daughter admittedly held the property for the debtor. [Tr. p. 87.] The Co-Operative Land and Livestock Company has now been abandoned. [Tr. p. 36.] During the operation of the property while the record title stood in the name of the corporation, the income over and above the operation costs went to the debtor in the form of borrowings. [Tr. p. 38.] The principal source of the company's income was from selling pasture, hay and grain. [Tr. p. 38.]

It was necessary in providing for irrigation of the meadow land to maintain, and he did maintain reservoirs, dams, dikes, canals and water diversion levees in order to provide an ample supply of grass. The meadow land was planted by Perry with grass, which grass was allowed to grow to maturity so as to allow the seeds from the heads thereof to shatter and furnish reseeding for the meadow. Thereafter livestock was turned into the meadow by Perry, while a large part of the water remained thereon, and the livestock grazed on the grass growing up

through the water. [Tr. pp. 66, 67.] It was not profitable to grow hay on the ranch, harvest, bale and ship the same because of the remote location of the ranch from transportation facilities. For this reason, the grass and grain was grown in the manner above set forth and sold to livestock owners for pasturage. All of this work was under the supervision of Perry. [Tr. pp. 66, 67.] In 1938, Perry sold grain from the ranch in the sum of $1522.08, and retained about an equal amount upon the ranch for feeding horses and livestock for reseeding purposes. Perry also qualified under the United States Government agricultural program in connection with certain operations on the ranch. [Tr. p. 68.] A rental arrangement was made by the debtor with one Frank Pocock during 1939 and 1940, whereby said Frank Pocock agreed to pay $15,000.00 rental. However, no money was paid. [Tr. p. 35.] During the year 1939, debtor made six or eight trips to this ranch, which was about 800 miles from his place of residence, staying one to three weeks on each trip, and his average time on the Triangle Ranch was two to three days each trip. [Finding IV, Tr. p. 130.] It took about a week to make the trip. [Evidence, Tr. p. 34.] The foregoing activities in relation to said Triangle Ranch were farming activities.

(B) That portion of Finding V, reading as follows:

> "The court finds that in his statements of expenses in connection with this property the debtor has included items aggregating the sum of $70,838.44, to make it appear that his net income therefrom for said four years' operating period was the sum of $1,112.17, and no more. The court finds that these statements of expenses were untrue in that they included as an item of expense a sum of $2,000.00 for March, 1937,

which in fact debtor paid to himself; that said expense statement was untrue for the further reason that it included a so-called expense account, consisting of moneys paid to himself in 1937, in the sum of $1800.00, and in 1938, $1200.00; and in 1939, $1,200.00. The court finds that said statements of expenses are untrue in the further particulars that they include an item of $934.00 entitled 'Metcalf Acct. Rent', which in fact has never been paid by debtor, and are untrue in the further particular that they include an item of $344.00 entitled, 'Freda Mintz', which item consists of a judgment against debtor which has not been paid in whole or in part. That in addition thereto in his 1936 statement for said building debtor lists as payments made to W. G. Lane sums totaling the sum of $1,566.29, which debtor claimed were payments made to one W. G. Lane to take care of the taxes upon said property. The court finds that this statement of payment by debtor is false and untrue, and known by the debtor to be false and untrue when given; the court finds that the debtor testified in a previous trial in the Superior Court of the State of California on September 29, 1937, as to the same fact, and there testified under oath, and the fact, is that such sums as he had paid W. G. Lane, including all of the sums which he in this proceeding described as payment of taxes, had been paid for purposes wholly unconnected with the building in question or the operations thereof. The court finds that by means of false and untrue entries in such statements the debtor has padded his account of expenses upon said property by the sum of $9,044.29 during the period under examination, and that the sum remaining in the possession of the debtor out of the proceeds of this property at the ex-

piration of the four years period under examination amounted to $10,156.46, instead of $1,112.17."

Said finding is clearly erroneous and is contrary to the evidence. The gist of the finding is that the debtor padded his account of expenses upon the Commercial Club Building in the amount of $9,044.29, by including in such account the following items:

(a) The sum of $2000.00 from March, 1937, which the Court found debtor paid to himself.

(b) Moneys paid to himself as expense account as follows: 1937, $1800.00; 1938, $1200.00; 1939, $1200.00; (c) $934.00 entitled "Metcalf Rent Account" which was not paid by the debtor; (d) $344.00 entitled "Freda Mintz" being an unpaid judgement; (e) $1566.29 paid to W. G. Lane which the Court found was for purposes wholly unconnected with the building.

The situation as disclosed by the evidence in respect to these items is as follows:

In regard to the $2000.00 item, the only evidence in support thereof is contained in the affidavit of Thomas F. McCue, wherein it is stated that the debtor has shown by his examination that he received as part of the item of expense of March, 1937, the sum of $2000.00 [Tr. p. 10], and that same was one of the proved items of attempted padded expense amounting to $9044.29. An analysis in relation to this item, however, shows that $2000.00 of the $4233.14 item of income in March was received by Perry, and treated as an expense item, making the expenses $5880.32 instead of $3880.32, all as set forth in the recapitulation of income and expenses. If we stop at this point Perry would have had the benefit

of the $2000.00. However, under the item "Bldg." we find in column 2 of the income that he has included the sum of $2000.00, which is also reflected in the sum of $5165.00, the footing of that column, which, in turn, is added to the main income column. In reality, therefore, the income of the building for 1937 instead of being $28,344.80, was $26.344.80. The $2000.00 is included twice. The expense column, instead of being $29,995.91, was really $27,995.91 if the $2000.00 be not treated as expense. The net result is the same whatever the bookkeeping method used. Perry paid out in that year $1651.11 more than he received in income. This is explained in the footnotes to the recapitulation for 1937 on page 56 of the transcript, and also in the affidavit of Perry, page 58 of the transcript, and that portion reading as follows:

> "That as to the items of money referred to on page 2 of the affidavit of the said Thomas F. McCue, lines 28-32, affiant asserts that the said sum of $2000.00 referred to on line 28, and which appears in the recapitulation of the building account for the year 1937, a copy of which recapitulation is attached to the summary of evidence of affiant filed herein, was charged back to affiant and added to the income of the hotel part of the building, and is included in the item of $4223.14, under date of March, 1937, and is added to and included in the expense of said building under March, 1937, in the item of $5580.32, and also appears in the item of $5165.00 as money received by affiant, and is again shown and is added to income from hotel in the income column, in figures immediately below the total of the income for said building for the entire year." [Exhibit A of Debtor's Summary of Evidence, Tr. p. 56, and particularly footnotes; Affidavit of Perry, Tr. p. 58.]

In respect to the expense account items, the only evidence that same were not actually expended by the debtor is that contained in the said affidavit of Thomas F. McCue [Tr. pp. 10, 12, 13] and then only inferentially, in that the affiant therein states that the debtor received said items as so-called expense account [Tr. p. 10], and said affiant likewise considered said items in making his calculations that the aggregate of said attempted padded expense was $9044.29. [Tr. p. 12.] Opposed to this inferential evidence, the debtor set forth in his affidavit in opposition to motion of Thomas F. McCue as follows [Tr. p. 59]:

> "That the item of $1800.00 received by affiant as expense account for the year 1937 was entirely expended by affiant in the promotion, development and maintenance of the business operated by affiant in said building, and particularly the cocktail lounge and dining room. That the item of $1200.00 received by affiant as expense account for the year 1938 was also entirely expended by affiant for the same purpose and that the item of $1200.00 received by affiant as expense account for the year 1939 was also entirely expended by affiant for the same purpose. That the purpose of these expenditures was testified to by affiant under oath before the Hon. C. P. Von Herzen, conciliation commissioner in these proceedings."

In regard to the Metcalf rent account item in the sum of $934.00, and the $344.00 Freda Mintz unpaid judgment, we find that same are listed in the 1939 building account under the item of expense, designated as "unpaid." [Tr. p. 54.] Even though unpaid, these items are liabilities and proper items of expense in connection with the building, and therefore proper deductions.

In respect to the item of W. G. Lane, the evidence in support thereof is likewise contained in said affidavit of Thomas F. McCue [Tr. pp. 11, 12] wherein the affiant makes the flat statement that the testimony of the debtor in respect to said items is false and fraudulent, and that he had testified in the action of *Baumann v. Harrison* in the Superior Court of the State of California to the effect that no payments had been made to Lane, excepting for Perry's own benefit on other obligations than that of the building. The debtor, however, in his affidavit in opposition to that of Mr. McCue states [Tr. p. 60], that the testimony so given referred to affiant's operation of the building during the first six months of his ownership thereof, which fact likewise appears from testimony of the debtor given in said action immediately preceding the testimony of the debtor stated in Mr. McCue's affidavit, wherein the debtor testified as follows:

> "I gave considerable money to the Lane Mortgage Company during that six months' period out of the rents of the building. Moneys applied on no indebtedness on any property excepting personal obligations of my own to the Lane Mortgage Company." [Tr. p. 60.]

The said debtor in said action likewise testified immediately following the testimony quoted by Mr. McCue as follows:

> "During that six months' period the property was not sold. It was not leased on any such plan as had been contemplated by myself and Mr. Vaughn. When the six months' period finally elapsed I determined

there wasn't anything due Vaughn or the Cabrillo Holding Corporation. I did not turn the property back to the Lane Mortgage Company or the bondholders. I claimed ownership of the building from the time I received it, that is, January of 1933." [Tr. p. 61.]

The debtor further set forth in his affidavit [Tr. p. 61] that $1566.29 was included in the amount of $2363.39 held in the name of Lane Mortgage Company, Trustee, and adjudged by the court in said Superior Court action to have been collected by Lane Mortgage Company for the plaintiff in that action.

(C) That portion of Finding V, reading as follows:

"The Court finds that this corporation (Co-operative Land & Livestock Company) has never engaged in farming operations of any kind or nature, and never owned any livestock, and that its only income was derived from selling pasture, hay and grain."

Selling pasture, hay and grain as the same was done in this case are clearly farming operations.

We have quoted at length in our objection to that portion of Finding IV (Specification of Error II-A), relating to the primary occupation of the debtor the work necessary to be done, and actually done by Perry, such as maintaining fences, reservoirs, dams, dikes, etc., and seeding in order to derive income from selling pasturage. Without here repeating the same, we ask that said evidence be considered in connection with this finding.

(D) All of Finding VI, reading as follows:

"The court finds that the primary occupation of debtor was that of property owner, and taking care of his own properties, or property which he claims to have owned, realtor and operator of a bar and cocktail lounge located in a height limit building in the City of Los Angeles. The court finds that such personal farming as debtor engaged in was neither primary or substantial, but was merely incidental to his ownership of property, including certain farm lands."

This finding is clearly erroneous, in that it is not supported by the evidence and was predicated upon an erroneous conception of the effect to be given work done under the United States Government Agricultural Program, and an erroneous conception as to the nature and effect of rentals received by the debtor in relation to debtor's status as a farmer. The substance of the evidence on this subject is given in connection with our specification of error II-A relating to the primary occupation of the debtor, and without repeating the same here, we ask that said evidence be considered in connection with this finding.

(E) That portion of Finding No. IX, reading as follows:

"The court finds that of this sum of $70,059.70 the debtor has paid to W. G. Lane and Lane Mortgage Company, out of the proceeds of the city property, the sum of $1566.20 upon other indebtedness which debtor then had with said Lane and Lane Mortgage Company."

Said finding is clearly erroneous, and is contrary to the evidence. The substance of the evidence on this subject is given in connection with our specification of error No. II-B. Without here repeating the said evidence, we ask that same be considered in connection with this finding.

3. The judgment of the lower court accepted by the appellate court without discussion was based upon conclusions of law, which are clearly erroneous in that the same are contrary to the evidence, and are made from findings of fact on material matters which are erroneous in the particulars hereinbefore set forth, and are likewise predicated upon an erroneous conception to be given work done under the Agricultural Adjustment Administration of the United States Government, and as to the nature and effect of rentals received by the debtor in relation to debtor's status as a farmer. Such conclusions of law and the particularity wherein same are erroneous are as follows:

(A) All of conclusion of law No. I, reading as follows:

"The court concludes that debtor is not an individual who is primarily *bona fide* personally engaged in producing products of the soil, nor in dairy farming, nor in the production of poultry or livestock, nor in the production of poultry products or livestock products in their unmanufactured state. The court concludes that such personal attention as debtor has given or gives to any one or all of the foregoing operations is purely incidental, rather than primary, and that such attention is incidental and secondary to his

primary occupations of looking after the properties which he owns or claims to own, and in conducting his real estate business and bar and cocktail lounge."

This conclusion is based upon findings which are erroneous in the particulars hereinbefore set forth, and is contrary to the evidence, the substance of which is set forth in the specifications of error above enumerated in respect to findings of fact, and is likewise predicated upon an erroneous conception of the effect to be given work done under the Agricultural Adjustment Administration of the United States Government, and an erroneous conception as to the nature and effect of rentals received by the debtor in relation to debtor's status as a farmer.

(B) All of conclusion of law No. II, reading as follows:

"The court concludes that the debtor is not an individual the principal part of whose income is derived from any one or more of the operations defined by Section 75-r of the Bankruptcy Act as amended."

This conclusion is based upon findings which are erroneous in the particulars hereinbefore set forth, and is contrary to the evidence, the substance of which is set forth in the specifications of error above enumerated in respect to findings of fact; is likewise predicated upon an erroneous conception of the effect to be given work done under the Agricultural Adjustment Administration of the United States Government, and an erroneous conception as to the nature and effect of rentals received by the

debtor in relation to debtor's status as a farmer; and is likewise predicated upon an erroneous interpretation of the effect to be given to the definition of a farmer under Section 75-r of the Bankruptcy Act, in that the Court construes the word "income" contained in said definition as meaning "gross income," when in fact it should be construed to mean "net income."

(C) All of conclusions of law Nos. III, IV and V. All of these are to the effect that the motions to dismiss the proceedings and to vacate the stays of proceedings in State courts should be granted. These conclusions are based upon findings which are erroneous in the particulars hereinbefore set forth, and are contrary to the evidence, the substance of which is set forth in our specifications of error above enumerated in respect to findings of fact.

These conclusions are likewise predicated upon an erroneous conception of the effect to be given work done under the Argicultural Adjustment Administration of the United States Government and an erroneous conception as to the nature and effect of rentals received by the debtor in relation to debtor's status as a farmer, and are also predicated upon an erroneous interpretation of the effect to be given to the definition of a farmer under Section 75-r of the Bankruptcy Act, in that the Court construes the word "income" contained in said definition as meaning "gross income," when in fact it should be construed to mean "net income."

(4) It is not at all clear whether or not the judgment of the District Court, affirmed by the Circuit Court of Appeals without discussion, is based upon the premise that the debtor is not a farmer or is based upon the ground that the debtor's proceeding was not instituted by the debtor in good faith and that it is impossible for the debtor to rehabilitate himself or to offer a fair, just or equitable settlement or composition to his creditors. If on the latter grounds, the judgment is erroneous in that there is no evidence, findings of fact, or conclusions of law to sustain the judgment; and furthermore, same would be contrary to law. In that the Court made no findings of fact nor conclusions of law respecting the above grounds set forth in said motion, we believe that the Court intended to base the judgment solely upon the ground that the debtor was not a farmer within the meaning of Section 75-r of the Bankruptcy Act. If the judgment granting the motion to dismiss is based upon said ground of lack of good faith and inability or impossibility of rehabilitation, not only is there a lack of findings of fact, conclusions of law or evidence to sustain the same, but it is likewise contrary to law, said grounds under the law not being grounds for the dismissal of a petition under Section 75 of the Bankruptcy Act. It would likewise be contrary to the evidence.

IV.

Argument.

1. **The Debtor Will H. Perry Is a Farmer Within the Meaning of Section 75-r of the Bankruptcy Act. The Circuit Court of Appeals and the District Court in Holding That He Is Not a Farmer Refused to Give Proper Effect to the Operations and Money Derived Therefrom in Connection With Work Done Under the Agricultural Adjustment Administration of the United States Government and Failed to Follow the Decision of This Court in Respect to Rentals Received by the Debtor in Connection With His Farming Properties.**

At the time of the filing of his petition, debtor was the owner of a 2600-acre ranch known as the La Costa Ranch in San Diego, California. The debtor in fact also owned an 18000-acre ranch, known as Triangle Ranch, in Modoc County, remote from transportation facilities. The record title to this property was originally in a corporation of which all stock was owned by the debtor. For several years prior to the filing of the petition the record title stood in the name of petitioner's daughter, and petitioner operated the ranch under a lease from his daughter. Debtor claims that his activities in respect to these properties, together with the fact that he was born on a farm, and all through his life has been engaged in farming activities, make him a farmer within the definition of Section 75r of the Bankruptcy Act. At the time of the filing of the petition, debtor claimed to be the owner of a building located in the City of Los Angeles, California, known as the Commercial Club Building. Litigation had been long pending at the time of the filing of his petition in respect to this asserted ownership, and a decree of the

Superior Court of Los Angeles County had been entered decreeing that he was not the owner of said building. However, by virtue of an appeal, said decree was not final at the time of the filing of the debtor's petition. A receiver had been placed in possession of this building in April of 1937, and from that time on said receiver continued in possession and operation of the building. However, because he wanted a ground for remaining in the building after the appointment of the receiver, debtor opened a cocktail lounge. The bar was operated by employees. It is our viewpoint that in determining the status of the debtor as to whether he was or was not a farmer, his activities in connection with the two ranches must be contrasted with his activities centering around the Commercial Club Building. The lower courts, however, and counsel opposed to the debtor, took the position that the only activity of the debtor in connection with the said ranches entitled to be treated as determining his status as a farmer was the operation by him of a certain portion of the said La Costa Ranch, to-wit, 243.6 acres and the production of one small crop on a portion of the Triangle Ranch. The effect of this was to exclude from the category of farming activities work done by him in compliance with the requirements of the Agricultural Adjustment Administration of the United States Government and returns received therefrom, and likewise work done by him in connection with securing pasturage and other rentals, and the income derived therefrom.

Section 75(r) of the Bankruptcy Act defines a farmer as follows:

> "For the purposes of this section, Section 4(b) and Section 74, the term 'farmer' includes not only an individual who is primarily *bona fide* personally en-

> gaged in producing products of the soil but also any individual who is primarily *bona fide* personally engaged in dairy farming, the production of poultry or livestock, or the production of poultry products or livestock products in their unmanufactured state, or the principal part of whose income is derived from any one or more of the foregoing operations, and includes the personal representative of a deceased farmer; and a farmer shall be deemed a resident of any county in which such operations occur."

We believe that the debtor herein is not only an individual who is primarily *bona fide* personally engaged in producing products of the soil, but he also can qualify as a farmer by reason of the fact that the principal part of his income is derived from farming operations.

On both these propositions, the District Court and the Circuit Court of Appeals held adversely to our contentions. We believe such ruling was based upon an erroneous conception of the effect to be given to operations on farms in conformity with the regulations of the United States Government Agricultural Program, for which payment was obtained from the United States Government, and from ignoring the rule announced by this Court in *First National Bank and Trust Co. of Bridgeport, Conn. v. Beach,* 57 S. Ct. 801, 301 U. S. 435, 81 L. Ed. 1206, as to rental payments made to farmers.

The effect of such payment by the United States Government for compliance with the Agricultural Program as it effects the operation of a debtor seeking relief under Section 75 of the Bankruptcy Act has not heretofore been passed upon by this Court, but now becomes a matter of great importance to the country generally, in that the Circuit Court of Appeals for the Ninth Circuit in affirming

this judgment has taken the position that the work done is not in the nature of farming operations in determining whether a person is a farmer within the meaning of Section 75-r of the Bankruptcy Act nor is the income derived from such farming operations to be deemed income of a farmer within the definition of said sub-section. The Circuit Court of Appeals in its opinion does not discuss the point, but states as follows:

> "The trial court found that appellant was not primarily *bona fide* personally engaged in any of the operations mentioned in subsection r, and that the principal part of his income was not derived from any one or more of said operations. These findings are amply supported by the evidence, and will not be disturbed."

We must go therefore to the findings of the lower court to determine the point adjudged. The District Court in finding No. IV [Tr. p. 129], found that the debtor was *bona fide* and personally engaged in producing products of the soil upon 243.6 acres of the La Costa Ranch in the County of San Diego. Again in Finding No. V, page 134, the District Court finds that of the 2600 acres in said ranch the only portion thereof cultivated by the debtor other than the compliance work under Federal Crop control was 493.6 acres, of which 250 acres were rented or leased to others, and again finds that the farming done upon this ranch by the debtor, or under his supervision was confined to 243.6 acres. In the same finding, page 133, the District Court found that the debtor realized $5415.24 from subsidy payments for soil conservation or crop control; $4132.64 from rentals, and $1586.66 from farming personally conducted and super-

vised by him. Again, in finding No. IX, page 137, the Court in finding the gross income of the debtor from all sources, among other items finds that he received from government subsidies, $5415.34, and received from farming operations done personally, or under the personal supervision of employees of the debtor, $3109.54. It is apparent, therefore, the Court adopted the view of opposing counsel that these payments by the government for this compliance work was in the nature of subsidies, and were not operations resulting in producing products of the soil, so as to entitle a debtor to claim that he was a farmer personally engaged in producing products of the soil in connection with such operations. Such construction we believe is erroneous. In this case, in connection with his work in compliance with the United States Government Agricultural program, it was necessary for the debtor to plant cover crop, do subsoiling and discing, plow under cover crops, plant hay and grass, which could be used for grazing, all in the nature of farming operations. We do not see how the work in this connection, or the returns from same can be classified other than as farming operations and income derived therefrom.

The finding of the District Court, approved by the Circuit Court of Appeals for the Ninth Circuit [Tr. p. 133], was that the farming upon the La Costa Ranch by the debtor or under the supervision of the debtor was confined to 243.6 acres. [Tr. p. 134.] The finding of the District Court, approved by the Circuit Court of Appeals was that the income derived from selling of pasturage, hay and grain from the Triangle Ranch was not in the nature of farming operations. [Tr. p. 134.] The pasturage arrangements in connection with said Triangle

Ranch was treated by the lower courts as rental. [Tr. p. 135.] The sum of $1522.88 was stated to be the amount received by the debtor from said ranch in the production of agricultural products. [Tr. p. 135.] We have no dispute with the findings of the Court, Finding IX [Tr. p. 137], as to the amounts received by the debtor from his various activities, but we do assert that the lower courts should have tied up the sums received as pasturage and other rentals, and for work in compliance with the Agricultural Adjustment Administration of the United States Government with the sums received in connection with his admitted farming activities, instead of treating same as non-farming operations. In ascribing only income received from debtor's cultivation of the 243.6 acres of the La Costa Ranch, plus the sum of $1522.88 derived from production of certain agricultural products from the Triangle Ranch as the only income derived by the debtor from farming operations, we think the Court not only erroneously construed the effect of the work done in connection with the Agricultural Adjustment Administration of the United States Government, but also ignored the decision of this Court in *First National Bank and Trust Co. of Bridgeport, Connecticut, v. Beach*, 57 S. Ct. 801, 301 U. S. 435, 81 L. Ed. 1206, *supra*.

Such construction effected both branches of the definition of what constitutes a farmer. We think it true as said by this Court in that decision:

> "The words 'primarily engaged' as we find them in the first branch of the definition, do not constitute a term of art. The words 'income derived from farming operations' do not constitute such a term. In every case the totality of the facts is to be considered and appraised."

Likewise it is true, as there said:

> "The farming and the leasing must be viewed in combination if we are to gain a true perspective, the two tied together as principal and incident. A single tract of land belonging to the debtor has been worked by him in part, and in part worked by others to whom a section of the tract has been let for cultivation. Far from stepping into another business, he has been faithful to the old one in thus dividing up the tillage. To get a living out of the land in one way or another is the thread of common purpose that binds the labor and the leases, and enables us to find in them the tokens of the same vocation. In brief the man is seen to be a farmer by every test of common speech, though his income has been garnered in rents as well as products. We emphasize the facts afresh that the words of the statute to which meaning is to be given are not phrases of art with a changeless connotation. They have a color and a content that may vary with the setting. . . . In the setting of this enterprise, the totality of its circumstance, the roots of the respondent's income go down into the soil."

In the *Beach* case, the debtor personally cultivated one-fourth of his farm, and let the other three-fourths to tenants. In our case in the main, the income designated as rentals, being rentals of pasturage, even smacked of the soil more as far as Perry was concerned than did the letting in the *Beach* case. In order to obtain these pasturage rentals derived mainly from the Triangle Ranch, it was necessary for the debtor to maintain fences, reservoirs, dams, dikes, and canals for the purpose of irrigation of the meadow lands in order to provide for pastur-

age. It was necessary that he plant grass which was allowed to grow to maturity so as to allow the seeds to shatter and provide reseeding for said meadows. Thereafter, livestock was turned into said meadow while a large portion of the water remained thereon. The livestock grazed on the grass growing up through the water. Because of the remote location of this ranch from transportation facilities, it was not profitable to grow hay, harvest, bale and ship the same, consequently, the grass and grain grown in the manner above described was sold off to livestock owners by rental pasturage. In refusing to view in combination the money derived from these said rentals with the money derived from the farming of the 243.6 acres, and in refusing to treat the payments received in connection with the United States agricultural program as money derived from farming operations, the picture was distorted as it related to both branches of the definition of a farmer. We have one picture, and that taken by the lower courts with Perry's only farming activities depicted as those in connection with the 243.6 acres of the La Costa Ranch, and the production of a small crop one year from the Triangle Ranch. We have a far different picture when his farming activities are taken not only as the activities in relation to the 243.6 acres of the La Costa Ranch, but his letting of 250 acres thereof, his work in connection with the Agricultural Adjustment Administration of the United States Government, and his work in connection with the balance of said ranch of 2600 acres and likewise his activities in connection with the Triangle Ranch of 18,000 acres, treating the work there done in obtaining pasturage rentals as work done in connection with farming activities. The latter we believe to be the true picture and under it the

debtor in this case would be a farmer, both in respect to primary activity and net income. The lower courts did not accept the true picture, because, as we see it, they refused to consider work done under the Agricultural Adjustment Administration of the United States Government as farm work, and refused to consider the activities of the debtor in connection with obtaining pasturage rental as performing farming operations within the meaning of the definition.

Work done in compliance with the Agricultural Adjustment Administration of the United States Government has been and is going on throughout the nation, and it is of prime importance that this Court announce the true rule as to the effect of work done under that program in relation to the definition of a farmer contained in Section 75 of the Bankruptcy Act. We urge likewise that this Court take cognizance of this case by virtue of the fact, as we see it, that the lower courts have ignored the rule announced by this Court in *First National Bank & Trust Co. of Bridgeport, Connecticut, v. Beach, supra*, in respect to rentals.

2. Conflict of Decision Between Ninth Circuit and Decisions of Other Circuit Courts of Appeals.

Under the erroneous constructions placed upon income received by the debtor from the Agricultural Adjustment Administration of the United States Government and rentals, it could be said that the income of the debtor from farming activities, both as to net and gross income, was less from farming than from non-farming

activities. However, it is apparent that the Circuit Court of Appeals for the Ninth Circuit by virtue of its approval of the findings of the District Court, and particularly Finding No. IX of the District Court [Tr. p. 137], and Conclusions of Law No. II [Tr. p. 139], has taken the position that the gross income is the income to be considered in connection with Section 75-r of the Bankruptcy Act. On the other hand, the Circuit Court of Appeals of the Second Circuit, in the case of *Sherwood v. Kitcher,* 86 Fed. (2d) 750, 32 A. B. R. (N. S.) 596, has held that net income is the criterion. In that case, the Court said:

> "In this aspect of the case he asks us to count the gross return from his farm and not the net. That would falsify the statute; the seed, the manure, the tools, the draught animals, the wagons, the planters and reapers; all these and more must be paid for out of the gross return before any 'income' results. It would be a meaningless test to compare the gross returns from the farming with those from another business; the result would have no relation either to the demands of the farm upon the debtor's time, or to his dependence upon it, the relevant factors."

We believe the definition from the Circuit Court of Appeals from the Second Circuit is correct. Admittedly, in our case, the gross receipts in connection with debtor's activities in and about the Commercial Club Building were considerably in excess of the gross receipts from both farming properties. If net income is the criterion, then

the situation is the reverse. The net income from the ranches was far in excess of the net income from the activities about the building.

The finding of the Court was that the amount remaining in the debtor's hands in connection with the operations in and about the Commercial Club property, after the payment of expenses, was $10,156.46, though the debtor claimed such net amount was $1112.17. [Tr. p. 132.] The Court found the amount remaining in the debtor's hands from income received in connection with the La Costa and Triangle Ranches after the payment of expenses was $24,524.01. [Tr. pp. 133-136.]

It seems to us that in construing income meant by the statute as net income, the Second Circuit is adopting the common sense construction, for it is out of the net income that the debtor must live. It is that income which is of primary importance. In our case, it was from the soil that the debtor obtained the major part of his livelihood.

3. Did the Court in Granting the Motion of Maud E. Lane to Dismiss the Proceedings do so on the Ground of the Improbability of Successful Rehabilitation by the Debtor as a Farmer, or Because of a Lack of Good Faith on His Part, and If so Was the Judgment Erroneous in That Respect.

The motions of Anna Baumann and Lane Mortgage Company, Trustee, in this proceeding were on the ground that debtor was not a farmer within the meaning of Section 75-r of the Bankruptcy Act. Maud E. Lane's

motion was on said ground and two others, namely, that the proceeding was not instituted in good faith, and that it was impossible for appellant to rehabilitate himself or to offer his creditors a fair, just or equitable composition. The Court in its Conclusion of Law No. IV concluded that the motion of Maud E. Lane should be granted, but did not state upon what ground. In view of the fact that in Conclusions Nos. I and II, the Court concluded that debtor in effect was not a farmer within the meaning of Section 75-r of the Bankruptcy Act, and made no findings of fact or conclusions of law in relation to the lack of good faith, or the improbability of successful rehabilitation, we believe the Court intended to base its judgment upon the ground that the debtor was not a farmer within the meaning of said Section 75 of the Bankruptcy Act. If, however, it can be said that the judgment granting the motion of Maud E. Lane was based upon said grounds of lack of good faith and inability of rehabilitation, the judgment is not only erroneous by reason of the lack of evidence, findings of fact, and conclusions of law to sustain the same, but it is likewise contrary to law in that said grounds are not proper grounds for the dismissal of a petition under Section 75 of the Bankruptcy Act, and ignores the decision of this Court in *John Hancock Mutual Life Insurance Co. v. Bartels*, 308 U. S. 180, 60 U. S. Sup. Ct. 221, 84 L. Ed. 176.

V.

Conclusion.

In conclusion, we again urge this Court to take over this case by a writ of certiorari in that, (a) it is important that this Court determine whether work done in compliance with the requirements of the Agricultural Adjustment Administration of the United States Government is to be considered in the nature of farming operations within the definition of Section 75-r of the Bankruptcy Act; (b) the action of the lower courts in ignoring the decision of this Court in *First National Bank & Trust Co. of Bridgeport, Connecticut, v. Beach,* 57 S. Ct. 801, 301 U. S. 435, 81 L. Ed. 1206, and possibly in *Hancock Mutual Life Insurance Co. v. Bartels,* 308 U. S. 180, 60 U. S. Sup. Ct. 221, 84 L. Ed. 176, should be corrected, and (c) this Court should determine whether Congress meant net income or gross income in using the word "income" in connection with the definition of the word "Farmer" in Section 75 of the Bankruptcy Act.

We submit that if the writ is granted, the ultimate decision should reverse the decision of the Circuit Court of Appeals of the Ninth Circuit and the decision of the District Court of the United States for the Southern District of California.

Dated at Los Angeles, California, this 5th day of August, 1942.

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